

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DANIEL MORTON,

Plaintiff,

v.

CITY OF ELLENSBURG, a Washington
Municipal Corporation; CITY OF
ELLENSBURG POLICE DEPARTMENT; CITY
OF ELLENSBURG PROSECUTING
ATTORNEY'S OFFICE; POLICE CHIEF
DALE MILLER (in his official and
individual capacities) and JANE DOE
MILLER, husband and wife and the
marital community composed thereof;
CORPORAL B. JONES (in his official
and individual capacities) and JANE
DOE JONES, husband and wife and the
marital community composed thereof;
DETECTIVE SERGEANT BRENT KOSS (in
his official and individual
capacities) and JANE DOE KOSS,
husband and wife and the marital
community composed thereof; TIM
WEED (in his official and
individual capacities) and JANE DOE
WEED, husband and wife and the
marital community composed thereof;
JOSH BENDER (in his official and
individual capacities) and JANE DOE
BENDER, husband and wife and the
marital community composed thereof;
PROSECUTOR FRAN CHMELEWSKI (in her
official and individual capacities)
and JOHN DOE CHMELEWSKI, husband
and wife and the marital community
composed thereof,

Defendants.

NO. CV-09-3092-EFS

**ORDER DENYING AND DENYING
AS MOOT IN PART
DEFENDANTS' MOTION TO
COMPEL and GRANTING
DEFENDANTS CHMELEWSKIS'
MOTION TO DISMISS**

1 Before the Court, without oral argument, are Defendants Fran and
2 John Doe Chmelewskis' Motion to Dismiss Pursuant to FRCP 12(b)(6) (Ct.
3 Rec. [15](#)) and a Motion to Compel Answers to Interrogatories and Requests
4 for Production of Documents (Ct. Rec. [19](#)) filed by all Defendants.
5 Plaintiff Daniel Morton opposes the motions.¹ After reviewing the
6 submitted material and relevant authority, the Court is fully informed.
7 For the reasons set forth below, the Court grants Defendants Chmelewskis'
8 motion to dismiss and denies and denies as moot in part Defendants'
9 motion to compel.

10 **A. Relevant Background²**

11 On July 10, 2007, the day after receiving a citation for minor in
12 possession/consumption, Mr. Morton was approached by Ellensburg Detective
13 Sergeant Brett Koss to assist in controlled buys for the Ellensburg
14 Police Department. Detective Koss threatened Mr. Morton that if he did
15 not agree to assist that he would be charged with an additional charge
16 of fourth degree assault. Mr. Morton declined to perform a controlled
17 buy; the next day he was charged with fourth degree assault.

18 During this time, Mr. Morton also had a pending minor in possession
19 charge in Lower Kittitas County District Court—the county in which
20 Ellensburg is located. Mr. Morton was to appear for court on July 18,

21 ¹ Plaintiff's response to the motion to dismiss was untimely.
22 Plaintiff is cautioned that a future untimely responsive memorandum may
23 result in the entry of an adverse Order. LR 7.1(e).

24 ² The "background" section is based on the Complaint's (Ct. Rec.
25 [1](#)) relevant factual allegations. See *Broam v. Bogan*, 320 F.3d 1023, 1028
26 (9th Cir. 2003).

1 2007; however, due to a family emergency he contacted Lower Kittitas
2 County District Court on July 16, and 18, 2007, to reschedule the
3 hearing. Mr. Morton was informed that the hearing date as changed.
4 Unfortunately for Mr. Morton, only the hearing *time*, but not the hearing
5 *date*, was rescheduled. Due to Mr. Morton's failure to appear at the July
6 18, 2007 hearing, an arrest warrant was issued.

7 After learning about the issuance of the arrest warrant, Mr. Morton
8 called the Lower Kittitas County District Court and Prosecutor Fran
9 Chmelewski. Prosecutor Chmelewski "advised [Mr. Morton] that the court
10 would hold a hearing on July 25, 2007 [sic] to recall and quash to [sic]
11 warrant. She assured [Mr. Morton] that the warrant would be quashed.
12 [Mr. Morton] relied on the information provided to him by the court and
13 by defendant Chmelewski" and did not appear for the July 25, 2007
14 hearing. (Ct. Rec. 1 ¶ 3.10.)

15 Contrary to Prosecutor Chmelewski's telephonic representation, at
16 the July 25, 2007 hearing, she encouraged the court to maintain the
17 arrest warrant. The court maintained the arrest warrant, which was
18 executed the next day.

19 On September 23, 2009, Mr. Morton filed this 42 U.S.C. § 1983
20 action, which also alleges state law claims, including a malicious
21 prosecution claim against Prosecutor Chmelewski. Trial is set for May
22 2, 2010. The instant motion to compel and motion to dismiss were filed
23 in August 2010.

24 **B. Defendants' Motion to Compel**

25 Defendants 1) ask the Court to require Mr. Morton to answer the May
26 27, 2010 propounded interrogatories and requests for production and

1 2) request recovery of the one-hour of attorney's fees incurred in
2 preparing the motion. Mr. Morton opposes the motion because counsel had
3 reached an agreement that discovery would be provided on a rolling basis
4 as it became available, discovery was fully provided on September 13,
5 2010, and defense counsel failed to meet and confer as required by Local
6 Rule 37.1 prior to filing the motion.

7 It is undisputed that on September 13, 2010, Mr. Morton provided
8 Defendants with the requested discovery. Mr. Morton's response, however,
9 was tardy. Federal Rules of Civil Procedure 33(b)(2) (interrogatories)
10 and 34(c) (requests for production) set thirty-day response deadlines,
11 absent formal agreement of the parties or Court permission. Neither
12 party submitted evidence of an agreement to extend these response
13 deadlines nor of an agreement to provide answers on a rolling basis.
14 Mr. Morton appears to blame his tardiness on the number of
15 interrogatories propounded: sixty-six interrogatories. Rule 33(b) does
16 limit the number of interrogatories to twenty-five interrogatories,
17 including subparts. Yet, Mr. Morton never filed a motion seeking relief
18 from the interrogatories.

19 Although Mr. Mortons's answers were tardy, the Court declines to
20 award Defendants' attorney's fees. Defense counsel did not comply with
21 Local Rule 37.1 prior to filing the motion to compel.

22 In conclusion, Defendants' motion to compel is denied as moot
23 (compel) and denied (attorney's fees request) in part.

24 **C. Defendants Chmelewskis' Motion to Dismiss**

25 Defendants Fran and John Doe Chmelewski request dismissal of
26 Mr. Morton's federal and state law claims against them because Ms.
Chmelewski enjoys immunity for the alleged prosecutorial actions. The

1 parties do not dispute the relevant legal principles regarding federal
2 prosecutorial absolute immunity for 42 U.S.C. § 1983 claims; and
3 Mr. Morton does not contest Defendants' assertion that Washington's
4 quasi-judicial immunity applies to bar Mr. Morton's state law claims.
5 The parties disagree, however, as to how the federal prosecutorial
6 absolute immunity legal principle applies here. Applying the immunity
7 principles articulated below, the Court finds that dismissal is
8 appropriate.³

9 "A state prosecutor is entitled to absolute immunity from liability
10 under § 1983 for violating a person's federal constitutional rights when
11 he or she engages in activities 'intimately associated with the judicial
12 phase of the criminal process.'" *Broam*, 320 F.3d at 1028 (citing *Imbler*
13 *v. Pachtman*, 424 U.S. 409, 430 (1976)). Therefore, absolute immunity
14 does not extend to *all* actions taken by a prosecutor: a prosecutor
15 enjoys only qualified immunity when performing investigatory or
16 administrative functions. *Id.* Accordingly, the focus is upon the nature
17 of the function performed with the recognition that a prosecutor's role
18 is not limited to the courtroom. *Id.* at 1028-29; *Imbler*, 424 U.S. at 431
19 n.33.

20
21 ³ In analyzing this Federal Rule of Civil Procedure 12(b)(6)
22 motion, the Court accepted the Complaint's factual allegations as true
23 and disregards the legal conclusions. *Ashcroft v. Iqbal*, 129 S. Ct.
24 1937, 1949 (2009). After assuming the veracity of the Complaint's
25 factual allegations, the Court determined they did not plausibly give the
26 right to relief. *Id.*

1 Here, the nature of the alleged function performed is prosecutorial.
2 Prosecutor Chmelewski was not merely discussing scheduling: an
3 administrative function. Rather, the alleged misrepresentation related
4 to the stance that the county would purportedly take relating to the
5 issued arrest warrant. A prosecutor's stance related to the issuance of
6 an arrest warrant that is directly communicated to the arrestee for
7 purposes of his reliance is intimately associated with the judicial
8 process. *Kalina v. Fletcher*, 522 U.S. 118, 129 (1997); see also *Waggy*
9 *v. Spokane County, Wash.*, 594 F.3d 707, 711 (9th Cir. 2010) ("The Supreme
10 Court has held absolute immunity protects a prosecutor who is appearing
11 in court in support of a warrant application, presenting evidence at a
12 hearing, or preparing for either the initiation or judicial proceedings
13 or trial."); *Hamilton v. Daley*, 777 F.2d 1207 (7th Cir. 1985) ("Securing
14 the attendance of the accused [at a criminal hearing] is equally a part
15 of the judicial process"). Prosecutor Chmelewski advocated for
16 her client when she allegedly misrepresented to Mr. Morton the county's
17 position relating to the issuance of the arrest warrant. And it was only
18 due to Prosecutor Chmelewski's role as a prosecutor that Mr. Morton could
19 reasonably rely upon the alleged misrepresentation. Accordingly,
20 Mr. Morton's relief for this alleged misrepresentation is not through a
21 § 1983 civil lawsuit but in another forum. The Chmelewskis' motion to
22 dismiss is granted.

23 **D. Conclusion**

24 For the above-given reasons, **IT IS HEREBY ORDERED:**
25
26

2. Defendants Fran and John Doe Chmelewski's Motion to Dismiss Pursuant to FRCP 12(b)(6) (**Ct. Rec. [15](#)**) is **GRANTED**. The case caption shall be amended to reflect the dismissal of the Chmelewskis.

IT IS SO ORDERED. The District Court Executive is directed to enter this Order and provide a copy to counsel.

DATED this 4th day of October, 2010.

s/Edward F. Shea
EDWARD F. SHEA
United States District Judge

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